IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ARBOR BEND VILLAS HOUSING, L.P.	§	
	§	
VS.	§	CIVIL ACTION 4:02-CV-478-Y
	§	
TARRANT COUNTY HOUSING FINANCE CORPORATION, ET AL.	§	

MEMORANDUM OPINION REGARDING THE DENIAL OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

On May 30, 2002, the Court denied plaintiff Arbor Bend Villas Housing, L.P. ("Arbor Bend")'s Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction, which was filed May 28. This memorandum opinion will set out the basis for that denial.

In October 2001, Plaintiff applied to the defendant Tarrant County Housing Finance Corporation ("TCHFC") for the issuance of tax-exempt bonds that had been allocated to Plaintiff and TCHFC by the State of Texas through the Texas Department of Housing and Community Affairs[1] so that Plaintiff could build a housing development for low-income families. (Pl.'s Compl. at 3-4.) TCHFC, subsequently, "conducted a preliminary review of the application and issued a statement that its present intention was to issue the bonds based on its determination that the applicant had demonstrated with reasonably certainty that the application, the bonds, and the project to be funded will qualify for approval by [TCHFC] and that all governmental approvals with respect to the bonds and the project would be obtained on or by May

[1]*See* TEX. GOV'T CODE ANN. § 1372.001 et seq. (Vernon 2000).

30, 2002."[2] (*Id.* at 4.) Thereafter, the State of Texas issued a report recommending approval of the bonds, two private entities found that the proposal for the bonds met all relevant financial and legal criteria, the plaintiff purchased the land for the project,[3] and the City of Fort Worth approved the project and issued building permits. (Pl.'s Compl. at 4.)

On March 6, 2002, the plaintiff requested that TCHFC give its final approval for the issuance of the bonds. (*Id.*) TCHFC, on May 6, held a meeting to discuss the issuance of the bonds and, instead of approving the bonds, requested that the plaintiff perform several additional studies of the possible impact of the proposed development on the neighborhood. (*Id.*) The plaintiff completed the requested studies, and TCHFC met again on May 28. (*Id.* at 4-5.) At this meeting, TCHFC did not vote on the plaintiff's application for the bonds. (*Id.* at 5.)

Consequently, at 2:44 p.m. on May 28, Plaintiff filed a Motion for Temporary Restraining Order and Preliminary Injunction with this Court. The plaintiff claimed that TCHFC's refusal to act on the bonds was due to the "opposition of residents of the neighborhood adjoining and near to the site of Plaintiff's proposed apartment development."

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[2]*See* TEX. GOV'T CODE ANN. § 1372.042 (Vernon 2000) (stating that an "issuer . . . shall close on the bonds for which the reservation was granted not later than the 120th date after the reservation date").

[3]This property is located at 6150 Oakmont Trail in Fort Worth, Texas.

Plaintiff alleges that the neighborhood opposition[4] is "based on the fact that the residents of the apartment will be lower-income families with children" and that by refusing to issue the bonds, the defendants have purposely discriminated against minorities and families with children, which is a violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq. (Pl.'s Compl. at 7-8.) The plaintiff requested that the Court issue a TRO ordering the defendants to *approve* the issuance of the tax-exempt bonds by May 30, a mere two days after filing the TRO. (Pl.'s Mot. at 12; Pl.'s Compl. at 10-11.) In support of its motion, Plaintiff attached an affidavit from Brian Potashnik ("Potashnik"), who is owner of Arbor Bend Villas, Development, L.L.C., which serves as a general partner of the plaintiff.[5]

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[4]With respect to this neighborhood opposition, the plaintiff stated:

> Since giving preliminary approval, the [TCHFC] has received no data or other documentation that would adversely impact their preliminary approval. To the contrary, all of the data and documentation warrant approval by the [TCHFC]. The sole objection to the project comes from residents some of who call themselves "NIMBY's" (not in my back yarders) who do not want low-income minority families with children in their neighborhood. They have made statements that the project will cause overcrowding of the hospitals because of increased pregnancies and resulting deliveries, and that Commissioner Bagsby has said she would not oppose a market rate multi-family complex on the site.

(Pl.'s Compl. at 7.)

[5]In the relevant portions of the affidavit, Potashnik stated:

> 14. The TCHFC engaged in a course of conduct to delay formal consideration of approval of the project. The TCHFC Board, directly or by deferring to certain members thereof, refused to timely set a public hearing on the Development, demanded unnecessary, additional studies, which are not regularly requested by issuers as part of the final approval process, and which TCHFC has not requested of other similar projects, or of developers of conventional projects of similar scope. . . . When the requested impact studies were in fact, provided by Southwest Housing, and at substantial effort and expense, however, the TCHFC deferred to the opposition of the Board

Defendant TCHFC argued, in its response, that the TRO should be denied because it had been rendered moot by the impossibility of issuing the bonds by May 30 and because the plaintiff had failed to prove its entitlement to the extraordinary relief that would be

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> member in whose district the Development is situated and refused to notice a hearing for purposes of voting on the approval of the Development. . . .
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> 16. The TCHFC has refused to advise Arbor Bend as to the reason for their refusal to notice a meeting before May 28th to consider approval of the bonds and has not stated a formal reason for tabling, not acting on, opposing, or refusing to vote on the issuance of the bonds.
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> . . . .
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> 19. I was present and heard TCHFC Board Member, Dionne Bagsby (the Tarrant County Commissioner for Precinct 1 in which the development is located) state "that the project doe not belong here, further stating, do not put low-income families isn the area where people have worked hard to enjoy a certain standard of living. Go to a bank or somewhere else for your money."
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> 20. I was present when Fort Worth City Councilman Chuck Silcox from District 3, the City Council District in which the Development is located in the presence of City staff, stated, presumably speaking for his District, that "we do not want these people living in this area," that "these people have no business in the area," and inquiring whether the Developer "knew that there are expensive homes in the area." Councilman Silcox demanded that the Development be moved to other areas. Mr. Silcox stated it was okay to build market rate, multi-family housing on the site or to build senior housing on the site, but do not put low-income families in the area.
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> 21. Representatives of homeowner opposition have stated publicly that they had moved to the area to avoid developments like Arbor Bend, that low-income families should not be placed in the areas of high-income families and because these type of people, presumably low-income families, -with- children, have more children (than higher income families), bring crime, and participate in more government programs, thus resources and services in the area such as schools and hospitals will be overly taxed by the construction of this 153 unit affordable housing development.
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> 22. The TCHFC's refusal even to consider the denial of approval of the bonds is, under the circumstances, coded [sic] way of improperly discriminating related to low-income family status (tenants with families with children) and minority status.

(Potashnik Aff. at 5-11.)

afforded by the Court's issuance of a temporary, but mandatory, restraining order. (TCHFC's Resp. at 5-10.) Defendant Tarrant County, Texas ("the County") argued that the motion for a TRO should be denied as not ripe because the County could not legally approve the bonds before their approval by the TCHFC. (County's Resp. at 2-4.)

Under well settled Fifth Circuit precedent, a TRO is an extraordinary remedy that should not be granted unless the movant proves the same elements required generally for injunctive relief: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury to the movant outweighs any harm to the nonmovant that may result from the injunction; and (4) that the injunction will not undermine the public interest. *See Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995); *see also Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990); *Canal Auth. of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). The grant of interim injunctive relief is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it." *Direx Isreal, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1992) (citing *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989).

Injunctive relief under usual circumstances is prohibitive, its purpose being to maintain the status quo pending a trial on the

merits. In this case, however, the plaintiff demanded the issuance, on two days' notice, of a TRO forcing the defendants to vote to alter the status quo by approving the issuance of the bonds.[6] This restraining order would then be a mandatory injunction commanding a positive, status-quo altering act. *See Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). Where mandatory relief is sought prior to the opponent's being allowed to appear and be heard in opposition, "the moving party must meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from a denial of the injunction." *Phillips v. Fairfield University*, 118 F.3d 131, 133 (2d Cir. 1997) (citing *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995); *see Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (stating that "[m]andatory preliminary relief . . . is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party"); *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979).

Here, the plaintiff was not merely demanding that the Court issue, without a hearing, a mandatory injunction.[7] Rather, the plaintiff

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[6]The Court notes that it does have the authority to take "affirmative action" to correct an alleged violation of the Fair Housing Act. *See* 42 U.S.C.A. § 3613(c)(1) (West 1994). However, this grant of authority to the Court does not lessen the plaintiff's burden to prove that it is entitled to a TRO.

[7]The Court notes that it held an informal conference with the parties on Thursday, May 30. While this conference was beneficial to the Court in clarifying the issues and the parties' positions, it was not an evidentiary

implored the Court to render, in essence, a final decision on the merits concluding that the defendants had in fact violated the Fair Housing Act and forcing the defendants--elected governmental officials who have been assigned discretionary duties--to act in a way that they were apparently unwilling to act.[8] "When a district court's order, albeit in the form of a TRO or preliminary injunction, will finally dispose of the matter in dispute, it is not sufficient for the order to be based on a likelihood of success or balance of hardships, *see Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); the district court's decision must be correct (insofar as possible on what may be an incomplete record)[.]" *Romer v. Green Point Savings Bank*, 27 F.3d 12, 16 (2d Cir. 1994); *see Phillips*, 118 F.3d at 134 (stating that "[t]his heightened showing is also required where the issuance of the injunction would provide the movant with substantially all the relief he or she seeks and where the relief could not then be undone, even if the non-moving party later prevails at trial"); *Guiness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 471 (2d Cir. 1980).

It should be apparent, then, that upon setting foot in this Court, the plaintiff faced a daunting burden of proof, beginning with the first requisite for the issuance of mandatory injunctive relief: a

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hearing and the Court could not take as evidence anything learned during the conference in deciding whether to issue the TRO. *See* FED. R. CIV. P. 65(b).

[8]The Court would have had to order both the TCHFC and either the Tarrant County Commissioner's Court or the County Judge to vote to approve the bonds.

demonstration that it was clearly entitled to that relief. The Fair Housing Act makes it unlawful to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status,[9] or national origin." *See* 42 U.S.C.A. § 3604(a) (West 1994). The prohibition against making a residence "unavailable" has been applied to situations where government agencies take actions that prevent construction of housing when the circumstances indicate a discriminatory intent or impact against anticipated future residents who are members of a class protected under the Act. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *Dews v. Town of Sunnyvale*, 109 F.Supp.2d 526 (N.D. Tex. 2000). A plaintiff seeking recovery under § 3604 may proceed under either a theory of disparate treatment[10] or disparate impact.[11] *See Simms v. First*

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[9]"Familial status" is defined as follows:

> [O]ne or more individuals (who have not attained the age of 18 years) being domiciled with--
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> (1) a parent or other person having legal custody of such individual or individuals; or
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> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.
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> The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

42 U.S.C.A. § 3602(k) (West 1994).

[10]Disparate treatment is also known as intentional discrimination. *See Texas v. Crest Asset Mgmt, Inc.*, 85 F.Supp.2d 722, 728 (S.D. Tex. 2000).

[11]Disparate impact or discriminatory effect "may be proven by showing either (1) 'adverse impact on a particular [protected] group' or (2) 'harm to the community generally by the perpetuation of segregation.'" *Id.* at 531 (citing

Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996) (stating that "a violation of the [Fair Housing Act] may be established not only by proof of discriminatory intent, but also by a showing a significant discriminatory effect"); *Texas v. Crest Asset Mgmt., Inc.*, 85 F.Supp.2d 722, 727 (S.D. Tex. 2000).

In this case, the plaintiff alleged that TCHFC engaged in intentional discrimination based on race and familial status in violation of the Fair Housing Act by not voting on the bond issue. (Pl.'s Mot. at 4-6.) A plaintiff can prove intentional discrimination through either direct or indirect (or circumstantial) evidence. *See Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Texas*, 85 F.Supp.2d at 728. When there is no direct evidence of discrimination, courts must use a form of analysis known as the *McDonnell Douglas* test.[12] Under this test, "the plaintiff must initially establish a *prima facie* case by satisfying a multi-factor test from which a discriminatory motive may be inferred, thus creating a rebuttable presumption of intentional discrimination." *Texas*, 85 F.Supp.2d at 729. In this case, the Court considered the following multi-factor test to determine whether the plaintiff had proven discriminatory

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Huntington Branch of NAACP v. Town of Huntington, 844 F.2d 926, 937 (2d. Cir. 1988).

[12] "This analysis is used to assess both employers' motions for summary judgment under [Federal Rule of Civil Procedure ("FRCP") 56 and their motions for judgment as a matter of law under FRCP 50." JANA HOWARD CAREY ET AL., BASICS OF EMPLOYMENT LAW, A BROADCAST FROM THE FEDERAL JUDICIAL CENTER AND THE ABA'S LABOR & EMPLOYMENT LAW SECTION (2001); *see also Rutherford v. Harris Cty., Tex.*, 197 F.3d 173, 180 (5th Cir. 1999) (stating that the *McDonnell Douglas* test is not to be used when a case has been fully tried on the merits).

intent: (1) discriminatory impact; (2) the historical background of the challenged decision; (3) the specific sequence of events leading up to the decision; (4) any procedural and substantive departures from the norm; and (5) the legislative or administrative history of the decision. *See Arlington Heights*, 429 U.S. at 266-68; *Buckeye Cmty. Hope v. City of Cuyahoga Falls*, 263 F.3d 627, 635, 639 (6th Cir. 2001) (stating that "the standard for finding discriminatory intent is the same under the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment"). "Once the plaintiff establishes a *prima facie* case, then the burden shifts to the defendant to articulate--but not prove-a legitimate nondiscriminatory reason for its action."[13] *Texas*, 85 F.Supp.2d at 729; *see McDonnell Douglas Corp*, 411 U.S. at 802. If the defendant meets its burden of production, then the burden shifts back to the plaintiff to show that "the reason proffered by the defendant is merely a pretext for discrimination." *Texas*, 85 F.Supp.2d at 729; *see McDonnell Douglas Corp.*, 411 U.S. at 802.

In this case, the plaintiff's sole evidence in support of its demand for mandatory injunctive relief was the complaint and a lone affidavit, both sworn to by Brian Potashnik, Plaintiff's owner and the most interested person Plaintiff could have possibly secured to provide sworn

[13]"It is important to note . . . that although the McDonnell Douglas presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

support. Through the Potashnik complaint and affidavit, the plaintiff presented the following circumstantial evidence of the THCFC's intentional discrimination against racial minorities and families with children: (1) the mostly conclusory statement that the principal vocal opposition to the development does not oppose multi-family housing at market rates but opposes the plaintiff's low-income, affordable housing because "low-income tenants will have, in effect, more children than other tenants and participate in more government programs that will tax the services in the areas such as schools, hospitals, and transportation facilities (Pl's Mem. at 6.); (2) the imposition by TCHFC on the plaintiff of the requirement of completing additional impact studies that have not been required of other developers in similar projects (Pl's Mem. at 7; Potashnik Aff. at 5); (3) TCHFC's refusal to vote on the bond issue at its May 28, 2002, meeting (Pl.'s Mem. at 7); (4) alleged statement by TCHFC Board member Bagsby that "'the project does not belong here,' further stating, 'do not put low-income families in the area where people have worked hard to enjoy a certain standard of living'" (Potashnik Aff. at 7); (5) alleged statement by Fort Worth City Councilman Silcox, a person without an official role in the decision, that "we do not want these people living in this area, . . . these people have no business in the area," and asking the developer whether it "knew that there are expensive homes in the area;" and (6) alleged statements by the homeowners in the area that "they had moved to the area to avoid developments like Arbor Bend, that low-income families should not be placed in the area of high-income families and because these type of people, presumably low-income families with children, have more children

(than higher income families), bring crime, and participate in more government programs[;]" thus taxing the resources and services in the area (Potashnik Aff. at 7).

It may be that at trial the plaintiff's proof would establish a *prima-facie* case for violation of the Fair Housing Act. But it falls far short of clearly demonstrating entitlement to mandatory injunctive relief.[14] Entitlement might have been shown with affidavits from aggrieved persons or from disinterested witnesses to neighborhood meetings coupled with, perhaps, sworn statistical data supporting the plaintiff's otherwise conclusory allegations as to disparate impact. But the Court had no such proof before it. Consequently, the Court denied Plaintiff's motion for a TRO.

SIGNED June 6, 2002.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/knv

[14]Because the Court has concluded that the plaintiff did not meet its burden with respect to the first requirement for obtaining a TRO, the Court will not discuss the plaintiff's performance on the other elements.